

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,

Plaintiff,

v.

OFFICE OF MANAGEMENT AND
BUDGET,

Defendant.

Civil Action No. 18-2424 (DLF)

JOINT STATUS REPORT

The parties, by and through their undersigned counsel, respectfully submit this status report pursuant to the Court's minute order of February 5, 2019.

Introduction

1. At issue are two Freedom of Information Act (FOIA) requests submitted by Plaintiff to Defendant, the Office of Management and Budget (OMB), on August 30, 2018, seeking records relating to the Federal Bureau of Investigation (FBI) Headquarters Consolidation Project. Plaintiff filed the Complaint on October 23, 2018, ECF No. 1; Defendant filed its Answer on December 7, 2018, ECF No. 7.

2. As previously reported, the parties are discussing the requests and Defendant's plan to search for potentially responsive records. On December 21, 2018, Defendant issued a letter to Plaintiff regarding Defendant's plan for processing the two FOIA requests, including search terms to be used. On January 29, 2019, Plaintiff provided Defendant with comments as to Defendant's search terms. On February 21, 2019, Defendant responded to Plaintiff's comments regarding the agency's proposed search.

3. The parties submit separate statements below regarding their respective positions and proposals for moving forward.

Plaintiff's Statement

4. At issue in this matter are two FOIA requests that made clear and specific requests for records related to the federal government's consideration of the relocation of the FBI Headquarters, the "Hotel Communications FOIA" request and the "White House Communications FOIA" request.

5. The parties have reached an impasse regarding the adequacy of Defendant's proposed search for records responsive to Plaintiff's requests. Defendant is refusing to run searches reasonably calculated to identify the records sought by these two requests. Instead, as explained more fully below, Defendant proposes to run a more limited search using proximity searches likely to exclude many responsive records. With respect to the Hotel Communications FOIA request, Defendant's proposed search ignores the plain terms of the request and consequently will not identify the document sought. Likewise, with respect to the White House Communications FOIA request, Defendant's proposed search is inadequate because it ignores Plaintiff's sixteen requested search terms and the proposals are patently incomplete and rely on searching for complex phrases that appear designed to miss relevant records. Furthermore, Defendant has not articulated a reasonable explanation as to why it will not conduct the searches necessary to identify and produce all responsive records.

6. The FOIA requires agencies to "make records promptly available to any person" "upon any request for records which . . . reasonably describes such records." 5 U.S.C. § 552(a)(3)(A). The Department of Justice's FOIA guide states, "The key to determining whether a request satisfies the ['reasonably describes'] requirement is the ability of agency staff

to reasonably ascertain exactly which records are being requested and to locate them.” *United States Department of Justice Guide to the Freedom of Information Act*, “Procedural Requirements” 22 (Sept. 4, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf> (citations omitted).

7. In the “Hotel Communications FOIA,” American Oversight requested two categories of records from the agency from January 20, 2017, through the date of the search. First, Plaintiff requested records reflecting communications from specifically identified employees at OMB (“the OMB custodians”)¹ and “any individuals associated with the Trump Organization LLC or Trump Hotels, including but not limited to” fifteen named persons and one category of “anyone communicating from an email address ending with” one of four domain names. Compl. ¶ 15. Second, American Oversight requested all records reflecting communications with the identified OMB custodians “containing [at least one of six] search terms.” *Id.*

8. The terms of the Hotel Communications FOIA request seek a clearly identified set of agency records that can be readily located by OMB with a reasonable amount of effort. The first category of this request seeks records reflecting communications between specifically identified OMB personnel and specifically identified persons acting in non-governmental capacities for an identified timeframe. Similarly, the second category of this request seeks records reflecting all communications containing one (or more) of six identified terms for a small number of identified OMB custodians over an identified time period.

¹ American Oversight identified two employees by name and title—Director Mick Mulvaney and Deputy Director Russ Vought—and one category of custodians including “anyone communicating on behalf of” the three employees.

9. Based on the clear terms of each category of the Hotel Communications FOIA request, an OMB employee could reasonably ascertain which agency records are sought and locate them. Both components of the request seek communications for a small set of specific OMB employees over an identified timeframe, and further limits the records sought, the first by seeking only communications with a small set of specific, identified non-governmental persons; and the second by seeking only communications containing one (or more) of six specific, identified terms.

10. Notwithstanding the fact that there can be no doubt that the Hotel Communications FOIA reasonably describes the records sought, including as that requirement is defined in the United States Department of Justice's FOIA guide, OMB has refused to undertake a search to identify the requested records, and seeks to substitute instead a search of a more limited number of custodians filtered by a quite limited set of search terms. Defendant has provided no legitimate explanation for its refusal to search for the records actually sought by this request.

11. In the "White House Communications FOIA," American Oversight requested records reflecting communications between or among any person at the White House Office and the identified OMB custodians "regarding the FBI headquarters consolidation project." Compl. ¶ 10. American Oversight further requested that the agency use sixteen specified terms to help identify responsive records. *Id.* ¶ 11.

12. The White House Communications FOIA request likewise reasonably describes the records sought allowing any agency employee to ascertain and locate all responsive records. First, the request is limited to records reflecting communications between a limited number of specifically identified OMB custodians and the White House Office from January 20, 2017,

through the date of the search. Within that set, Plaintiff requested that the agency search for records that contain one (or more) of sixteen search terms. While this request employs a longer list of search terms, it seeks a search only of that subset of communications that include both the identified OMB custodians and the White House Office.

13. Notwithstanding the clear language of the request, Defendant is again declining to undertake a search reasonably calculated to identify records responsive to the White House Communications FOIA request. Although American Oversight specifically requested that the identified search terms be used, the agency is refusing to do so based purely on speculation, blindly claiming that—despite the request’s clear limitations on (a) the custodians to be searched; (b) the correspondents whose communications are responsive; (c) the use of one of sixteen identified search terms; and (d) the time period to be searched—it believes the potential yield of potentially responsive records to be reviewed might be too burdensome.

14. The sixteen search terms identified relate to the president’s interest in the Old Post Office building and the FBI headquarters procurement process being run by the General Services Administration. In a properly-run federal procurement process, there would be very limited reason for the OMB custodians to be communicating with the White House Office regarding those subjects, and it would be reasonable to expect few if any responsive records. Thus the agency’s refusal to run the search as requested raises more concerns than it seeks to address: surely it cannot be that Defendant is suggesting that Director Mulvaney and Deputy Director Vought were communicating with the White House Office and referencing the “Trump International Hotel” (one of the requested search terms) with such frequency that the resulting volume of records would be overly burdensome for the agency to review.

15. “[T]he adequacy of a FOIA search is generally determined . . . by the appropriateness of the methods used to carry out the search.” *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). American Oversight requested specific searches and Defendant is refusing honor the requested method of search. The agency’s proposed search terms are inadequate and appropriate. First, with respect to the Hotel Communications FOIA request, as explained above, the proposed search simply fails to account for the records actually sought by the request. With respect to the White House Communications FOIA request, Defendant’s proposed search terms are not reasonably calculated to identify the requested records, but instead are overly limited, defy common sense, and fail to account for how officials would be likely to communicate in responsive communications. For example, one of the aspects on which the request clearly seeks records is communications discussing whether the presence of the president’s hotel across from the FBI Headquarters at all influenced the decision not to relocate the agency. See Compl. ¶ 11 (listing search terms to include “Trump International Hotel,” “TIH,” “Post Office,” and “OPO,” among others). None of OMB’s proposed search terms include any reference to the Trump International Hotel or the federally owned Old Post Office Building that the hotel occupies, except to the extent that “Trump” might be written within 25 words of “FBI headquarters” or “FBI HQ.” As another deficiency in the agency’s proposed search, the required combinations of terms do not reflect how persons would naturally discuss this project. While it is possible that someone reporting out on a meeting at the White House might say, “The White House had no position on the FBI headquarters consolidation project,” it is also possible that someone reporting out on the same meeting might say, “Kelly said they had no position on consolidation.” American Oversight’s requested search would capture the latter communication, but OMB’s proposed search does not.

16. Plaintiff's interest is in getting copies of non-exempt material promptly as required by FOIA and not in delay and protracted processing by the agency, and so Plaintiff remains open to undertaking an informed discussion regarding narrowing if necessary after Defendant has undertaken an initial search. As Plaintiff has demonstrated repeatedly in other matters involved in FOIA litigation and in FOIA processing discussions with agencies, if the requested searches yield an overly burdensome number of records for Defendant to review, Plaintiff would be happy to engage in a negotiation to narrow the records to be reviewed within that set. However, any narrowing discussions can only be undertaken in an informed manner with actual information regarding the results of initial searches—for instance, if one search term is resulting in numerous, inapposite hits, Plaintiff would of course be willing to engage in discussions with Defendant. At this point, however, Plaintiff believes that the request is not overly burdensome as drafted and maintains that Defendant should search for the records as requested. Any suggestion otherwise is simply uninformed speculation at this point.

17. In light of this impasse and because it would not serve the interests of Plaintiff, Defendant, or the Court for Defendant to proceed with its proposed search before these clear insufficiencies are addressed, Plaintiff requests that the Court order them to appear for a status conference on March 5, 2019, or on another date convenient for the Court. Plaintiff has not had an opportunity to review Defendant's Statement, and reserves the right to file a supplementary response.

Defendant's Statement

Defendant's Search Plan for Plaintiff's FOIA Requests

The first FOIA request at issue in this case (OMB 2018-527) seeks certain records between specified OMB officials and persons at the White House regarding the FBI headquarters consolidation project. Although Plaintiff proposes that the search include documents with one or more of sixteen search terms, such as "consolidate*" or "Post Office," OMB determined that use of these terms on their own would be overly broad and would unnecessarily capture many records that are unrelated to the FBI headquarters consolidation project. As a consequence, use of Plaintiff's proposed terms would cause significant delays in locating and processing records. OMB used as search terms any of the following for emails with any participant ending in "who.eop.gov":

"FBI headquarters consolidation project,"
"FBI" (w/25) "Headquarters," OR
"FBI HQ."

OMB has estimated that there are 62 records potentially responsive to this request.

The second request (OMB 2018-528) consists of two parts. The first part, which seeks certain records between specified OMB officials and fifteen specified Trump Organization officials, does not expressly state a subject matter and thus is vague and overly broad. OMB interprets the first part of the request as seeking records pertaining to the FBI headquarters consolidation project and the Trump Hotel or the Trump Organization. OMB used the same search terms listed above, except that OMB replaced the "who.eop.gov" limitation with any of the names of individuals and email domains listed in column B of the table included in this request.

The second part of this request, which seeks records to or from specified OMB officials, does not identify any third parties and, although Plaintiff proposes search terms as discussed below, the request does not expressly state a subject matter, and thus it is confusing and overly broad. OMB interprets the second part of this request as seeking records pertaining to the FBI headquarters consolidation project and the Trump Hotel or the Trump Organization. Although Plaintiff proposes that the search include documents with one or more of six search terms (including "Post Office"), OMB determined that use of these terms, combined with the absence of any third parties or subject-matter, would be overly broad and would unnecessarily capture many records that are unrelated to the FBI headquarters consolidation project. As a consequence, use of Plaintiff's suggested terms would cause significant delays in locating and processing records.

OMB has estimated that there are 77 records potentially responsive to this request.

OMB's expertise with its own records systems and the methods by which to search them has informed its search plans. The agency's searches for both requests (OMB 2018-527 and OMB 2018-528) are reasonably calculated to locate all documents potentially responsive to the requests, without capturing voluminous records that are unrelated to the requests.

OMB estimates that it can process and release all responsive records by April 2, 2019.

Defendant's Position as to Plaintiff's Request for an Immediate Hearing

OMB will continue to consult with Plaintiff as to any issues regarding OMB's processing of the FOIA requests, including issues discussed by Plaintiff in this statue report. However, the Court should deny Plaintiff's request for an immediate hearing regarding the adequacy of the

searches that are being conducted by OMB for any records responsive to Plaintiff's two FOIA requests at issue in this case. First, to the extent that Plaintiff now seeks affirmative relief, Plaintiff should be required to follow normal motion practice, rather than seeking relief in the guise of a joint status report. Second, even if Plaintiff were to file such a motion, it would be premature for the parties to litigate the adequacy of the searches before OMB completes the searches and processes any responsive records, and Plaintiff's request for an immediate hearing on this issue contravenes this district's established procedures for FOIA cases. "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). Summary judgment in a FOIA case is most appropriate after the agency has finished producing all responsive, non-exempt information to the FOIA petitioner.

After providing Plaintiff with OMB search plan (including search terms), OMB initiated its searches for any responsive records. OMB's expertise with its own records systems and the methods by which to search them has informed its search plans.

OMB estimates that it can process and release all responsive records by April 2, 2019. OMB should be permitted to conduct the searches and to complete its processing of any responsive records prior to any litigation as to the adequacy of the searches. At summary judgment, OMB will of course establish the reasonableness of its search via agency declaration(s).

Third, Plaintiff's challenge to the adequacy of the searches being conducted by OMB (including search terms) is not only premature, but also based on a false premise. "In general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request." *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) (citing *Physicians for Human Rights v. Dep't of Def.*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009)). Rather, a federal agency has discretion

in crafting a list of search terms that it believes to be reasonably tailored to uncover documents responsive to the FOIA request. *See Bigwood*, 132 F. Supp.3d at 140 (citing *Physicians for Human Rights*, 675 F. Supp. 2d at 164). Similarly, the reasonableness of a search “is not measured against the scope dictated by a requester’s search instructions.” *McClanahan v. U.S. Dep’t of Justice*, 204 F. Supp. 3d 30, 44 (D.D.C. 2016), *aff’d*, 712 Fed. Appx. 6 (D.C. Cir. 2018); *see also Mobley v. CIA*, 806 F.3d 568, 582 (D.C. Cir. 2015) (rejecting plaintiff’s approach, “which would allow a requester to dictate, through search instructions, the scope of an agency’s search,” as undermining “the reasonableness test for search adequacy long adhered to in this circuit”).

For all of these reasons, the Court should allow the parties to continue discussing any issues regarding OMB’s processing of the FOIA requests, including any issues raised by Plaintiff in this status report, and to file a joint status report in thirty days. However, the Court should deny Plaintiff’s request for an immediate hearing regarding the adequacy of OMB’s searches.

DATED: February 21, 2019

/s/ Hart W. Wood

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 18-2421 (RC)

JOINT STATUS REPORT

The parties, by and through their undersigned counsel, respectfully submit this status report pursuant to the Court's minute order of January 30, 2019.

Introduction

1. At issue are two Freedom of Information Act (FOIA) requests submitted by Plaintiff to Defendant, the U.S. Department of Justice (DOJ), on August 30, 2018, seeking records relating to the Federal Bureau of Investigation (FBI) Headquarters Consolidation Project. Plaintiff filed the Complaint on October 23, 2018, ECF No. 1; Defendant filed its Answer on December 7, 2018, ECF No. 7.

2. As previously reported, the parties are discussing the requests and Defendant's plan to search for potentially responsive records. On February 1, 2019, Defendant sent an email to Plaintiff regarding Defendant's plan for processing the two FOIA requests, including search terms to be used. On February 4, 2019, Plaintiff provided Defendant with comments as to Defendant's search terms. On February 13, 2019, Defendant responded to Plaintiff's comments regarding the agency's proposed search.

3. The parties submit separate statements below regarding their respective positions and proposals for moving forward.

Plaintiff's Statement

4. At issue in this matter are two FOIA requests that made clear and specific requests for records related to the federal government's consideration of the relocation of the FBI Headquarters, the "Hotel Communications FOIA" request and the "White House Communications FOIA" request.

5. The parties have reached an impasse regarding the adequacy of Defendant's proposed search for records responsive to Plaintiff's requests. Defendant is refusing to run searches reasonably calculated to identify the records sought by these two requests. Instead, as explained more fully below, Defendant proposes to run a more limited search using proximity searches likely to exclude many responsive records. With respect to the Hotel Communications FOIA request, Defendant's proposed search ignores the plain terms of the request and consequently will not identify the document sought. Likewise, with respect to the White House Communications FOIA request, Defendant's proposed search is inadequate because it ignores Plaintiff's sixteen requested search terms and the proposals are patently incomplete and rely on searching for complex phrases that appear designed to miss relevant records. Furthermore, Defendant has not articulated a reasonable explanation as to why it will not conduct the searches necessary to identify and produce all responsive records.

6. The FOIA requires agencies to "make records promptly available to any person" "upon any request for records which . . . reasonably describes such records." 5 U.S.C. § 552(a)(3)(A). The Department of Justice's own FOIA guide states, "The key to determining whether a request satisfies the ['reasonably describes'] requirement is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them." *United States Department of Justice Guide to the Freedom of Information Act*, "Procedural

Requirements” 22 (Sept. 4, 2013),

<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf>
(citations omitted).

7. In the “Hotel Communications FOIA,” American Oversight requested two categories of records from the agency from January 20, 2017, through the date of the search. First, Plaintiff requested records reflecting communications from certain specifically identified employees at DOJ (“the DOJ custodians”)¹ and “any individuals associated with the Trump Organization LLC or Trump Hotels, including but not limited to” fifteen named persons and one category of “anyone communicating from an email address ending with” one of four domain names. Compl. ¶ 17. Second, American Oversight requested all records reflecting communications with the identified DOJ custodians “containing [at least one of six] search terms.” *Id.*

8. The terms of the Hotel Communications FOIA request seek a clearly identified set of agency records that can be readily located by the DOJ with a reasonable amount of effort. The first category of this request seeks records reflecting communications between specifically identified DOJ personnel and specifically identified persons acting in non-governmental capacities for an identified timeframe. Similarly, the second category of this request seeks records reflecting all communications containing one (or more) of six identified terms for a small number of identified DOJ custodians over an identified time period.

9. Based on the clear terms of each category of the Hotel Communications FOIA request, an DOJ employee could reasonably ascertain which agency records are sought and

¹ American Oversight identified three employees by name and title—then-Attorney General Jeff Sessions, Deputy Attorney General Rod Rosenstein, and Assistant Attorney General for Administration Lee Lofthus—and one category of custodians including “anyone communicating on behalf of” the three employees.

locate them. Both components of the request seek communications for a small set of specific DOJ employees over an identified timeframe, and further limits the records sought, the first by seeking only communications with a small set of specific, identified non-governmental persons; and the second by seeking only communications containing one (or more) of six specific, identified terms.

10. Notwithstanding the fact that there can be no doubt that the Hotel Communications FOIA reasonably describes the records sought, including as that requirement is defined in DOJ's own FOIA guide, the DOJ has refused to undertake a search to identify the requested records, and seeks to substitute instead a search of a more limited number of custodians filtered by a quite limited set of search terms. Defendant has provided no legitimate explanation for its refusal to search for the records actually sought by this request.

11. In the "White House Communications FOIA," American Oversight requested records reflecting communications between or among any person at the White House Office and the identified DOJ custodians "regarding the FBI headquarters consolidation project." Compl. ¶ 10. American Oversight further requested that the agency use sixteen specified terms to help identify responsive records. *Id.* ¶ 11.

12. The White House Communications FOIA request likewise reasonably describes the records sought allowing any agency employee to ascertain and locate all responsive records. First, the request is limited to records reflecting communications between a limited number of specifically identified DOJ custodians and the White House Office from January 20, 2017, through the date of the search. Within that set, Plaintiff requested that the agency search for records that contain one (or more) of sixteen search terms. While this request employs a longer

list of search terms, it seeks a search only of that subset of communications that include both the identified DOJ custodians and the White House Office.

13. Notwithstanding the clear language of the request, Defendant is again declining to undertake a search reasonably calculated to identify records responsive to the White House Communications FOIA request. Although American Oversight specifically requested that the identified search terms be used, the agency is refusing to do so based purely on speculation, blindly claiming that—despite the request’s clear limitations on (a) the custodians to be searched; (b) the correspondents whose communications are responsive; (c) the use of one of sixteen identified search terms; and (d) the time period to be searched—it believes the potential yield of potentially responsive records to be reviewed might be too burdensome.

14. The sixteen search terms identified relate to the president’s interest in the Old Post Office building and the FBI headquarters procurement process being run by the General Services Administration. In a properly-run federal procurement process, there would be limited reason for the DOJ custodians to be communicating with the White House Office regarding those subjects, and it would be reasonable to expect few if any responsive records. Thus the agency’s refusal to run the search as requested raises more concerns than it seeks to address: surely it cannot be that Defendant is suggesting that the Attorney General and other senior DOJ officials were communicating with the White House Office and referencing the “Trump International Hotel” (one of the requested search terms) with such frequency that the resulting volume of records would be overly burdensome for the agency to review.

15. “[T]he adequacy of a FOIA search is generally determined . . . by the appropriateness of the methods used to carry out the search.” *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). American Oversight requested specific searches and

Defendant is refusing honor the requested method of search. The agency's proposed search terms are inadequate and appropriate. First, with respect to the Hotel Communications FOIA request, as explained above, the proposed search simply fails to account for the records actually sought by the request. With respect to the White House Communications FOIA request, Defendant's proposed search terms are not reasonably calculated to identify the requested records, but instead are overly limited, defy common sense, and fail to account for how officials would be likely to communicate in responsive communications. For example, one of the aspects on which the request clearly seeks records is communications discussing whether the presence of the president's hotel across from the FBI Headquarters at all influenced the decision not to relocate the agency. See Compl. ¶ 11 (listing search terms to include "Trump International Hotel," "TIH," "Post Office," and "OPO," among others). None of DOJ's proposed search terms include any reference to the Trump International Hotel or the federally owned Old Post Office Building that the hotel occupies. As another deficiency in the agency's proposed search, the required combinations of terms do not reflect how persons would naturally discuss this project. While it is possible that someone reporting out on a meeting at the White House might say, "The White House had no position on FBI consolidation," it is also possible that someone reporting out on the same meeting might say, "Kelly said they had no position on consolidation." American Oversight's requested search would capture the latter communication, but DOJ's proposed search does not.

16. Plaintiff's interest is in getting copies of non-exempt material promptly as required by FOIA and not in delay and protracted processing by the agency, and so Plaintiff remains open to undertaking an informed discussion regarding narrowing if necessary after Defendant has undertaken an initial search. As Plaintiff has demonstrated repeatedly in other

matters involved in FOIA litigation and in FOIA processing discussions with agencies, if the requested searches yield an overly burdensome number of records for Defendant to review, Plaintiff would be happy to engage in a negotiation to narrow the records to be reviewed within that set. However, any narrowing discussions can only be undertaken in an informed manner with actual information regarding the results of initial searches—for instance, if one search term is resulting in numerous, inapposite hits, Plaintiff would of course be willing to engage in discussions with Defendant. At this point, however, Plaintiff believes that the request is not overly burdensome as drafted and maintains that Defendant should search for the records as requested. Any suggestion otherwise is simply uninformed speculation at this point.

17. In light of this impasse and because it would not serve the interests of Plaintiff, Defendant, or the Court for Defendant to proceed with its proposed search before these clear insufficiencies are addressed, Plaintiff requests that the Court order them to appear for a status conference on March 4, 2019, or on another date convenient for the Court. Plaintiff has not had an opportunity to review Defendant's Statement, and reserves the right to file a supplementary response.

Defendant's Statement

Defendant's Search Plan for Plaintiff's FOIA Requests

The first FOIA request (OIP Request DOJ-2018-007946, DOJ-2018-008730; JMD # 114860) seeks certain records between specified DOJ officials and persons at the White House regarding the FBI headquarters consolidation project, and Plaintiff suggests sixteen search terms. The second request (OIP Request DOJ-2018-007947, DOJ-2018-008731; JMD # 114861) includes two parts. The first part seeks records between specified DOJ officials and specified Trump Organization officials, and does not expressly limit the search to any specific subject

matter. The second part of this request seeks records to or from specified DOJ officials, does not identify any third parties, and proposes six search terms. Reading each of Plaintiff's initial requests as a whole, DOJ understands that Plaintiff is broadly seeking records related to the FBI Headquarters project and the Trump Hotel or Trump Organization. In response, DOJ will not cast an overly broad net in searching for records as Plaintiff has sought in its initial request and its proposed search terms. Rather, DOJ will craft a reasonably-tailored, dynamic search plan based on and informed by its FOIA expertise and familiarity with the records of the Senior Leadership Offices.

Accordingly, DOJ has initiated a search for these two FOIA requests using the search terms listed below. These terms listed in DOJ's initial search plan reflect many of the suggested search terms included in Plaintiff's two FOIA requests, with proximity search parameters added to better identify records responsive to the subject matter as described by Plaintiff in the two requests. In responding to Plaintiff's requests, it is the sole responsibility of DOJ to craft a search plan and identify relevant records custodians, records repositories, and search capabilities and methods, and it is not for Plaintiff to dictate the terms or methods of the search. Nonetheless, DOJ endeavors to work with requesters and to employ requester input into searches. DOJ has, therefore, worked with Plaintiff's suggestions and has tailored Plaintiff's search terms to most effectively identify records responsive to Plaintiff's two FOIA requests.

- consolidat* w/30 FBI
- renovat* w/30 FBI
- demoli* w/30 FBI
- rebuild* w/30 FBI
- relocat* w/30 FBI
- Trump w/30 FBI
- "post office" w/30 FBI
- OPO w/30 FBI
- JEH w/30 Trump.

Plaintiff has mischaracterized DOJ's initial search plan throughout Plaintiff's Statement.

In paragraph 10, Plaintiff alleges that DOJ has limited the number of search custodians, which is not the case. DOJ is searching the requested records custodians in the offices requested by Plaintiff: the Offices of the Attorney General, the Deputy Attorney General, the Assistant Attorney General for Administration, and anyone communicating on their behalf. In paragraph 15, Plaintiff inaccurately represents that Defendant's initial search plan does not include any reference to the Trump International Hotel or the Old Post Office Building in which the hotel is located. Three of the search terms listed above specifically refer to Trump, "OPO" and "post office" to capture records related to the Trump International Hotel or the Old Post Office Building, as they concern the FBI headquarters project. In paragraph 15, Plaintiff also provides an example of an email that they say would be missed using DOJ's search terms.

Notwithstanding the fact that the legal standard for search adequacy is reasonableness, and reasonableness does not require capturing every possible iteration of a record, DOJ's proposed search terms would capture that email as long as it appeared somewhere within 30 words of the search term "FBI."

As DOJ has informed Plaintiff, DOJ estimates that the searches can be completed by June 15, 2019, and that, two weeks after the searches are completed, DOJ can propose a processing schedule.

Defendant's Position as to Plaintiff's Request for an Immediate Hearing

DOJ will continue to consult with Plaintiff as to any issues regarding DOJ's processing of the FOIA requests, including any issues raised by Plaintiff in this status report. However, the Court should deny Plaintiff's request for an immediate hearing regarding the adequacy of the searches that are being conducted by DOJ for any records responsive to Plaintiff's two FOIA

requests at issue in this case. First, to the extent that Plaintiff now seeks affirmative relief, Plaintiff should be required to follow normal motion practice, rather than seeking relief in the guise of a joint status report. Second, even if Plaintiff were to file such a motion, it would be premature for the parties to litigate the adequacy of the searches before DOJ completes the searches and processes any responsive records, and Plaintiff's request for an immediate hearing on this issue contravenes this district's established procedures for FOIA cases.

"FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). Summary judgment in a FOIA case is most appropriate after the agency has finished producing all responsive, non-exempt information to the FOIA petitioner. Plaintiff's suggestion that it should be allowed to insert itself into this process at this early stage is not only contravened by well-established precedent, but it is inefficient and counter-productive. The administrative process of searching for and processing records in response to a FOIA request is a dynamic, evolving, and complex process. Throughout the search process and records review processes, DOJ continually assesses whether supplemental or alternative search methods or search terms should be used or additional search custodians or records repositories should be searched and will initiate such additional searches as appropriate. For instance, if during the course of reviewing initial search results FOIA staff identify commonly-used terms or phrases employed by records custodians, which were not initially searched, it is routine procedure to then conduct a supplemental search for those newly-uncovered search terms. This ensures a robust and dynamic search which is informed by the records themselves. The initial search plan that DOJ shared with Plaintiff is just that – an initial plan – which will evolve as the search process continues to progress.

DOJ has been very accommodating in discussing its initial search plan with Plaintiff.

After providing a first draft of the search plan to Plaintiff and listening to its concerns, DOJ made responsive adjustments based on Plaintiff's input. After providing Plaintiff with DOJ's updated second search plan, DOJ initiated its searches for any responsive records. However, the adequacy of the search itself is an agency determination which Plaintiff will have ample opportunity to challenge if, once the search is actually completed and DOJ provides a complete description of the entirety of that search process, Plaintiff still has objections to the search conducted by DOJ. DOJ must have the opportunity to complete its searches for and processing of any responsive records prior to litigating the adequacy of its searches. As previously mentioned, the search process has just begun, which is often the very reason FOIA cases are decided on motions for summary judgment at the end of the administrative search and records-processing process. DOJ should be permitted to conduct the searches and to complete its processing of any responsive records prior to any litigation as to the adequacy of the searches. At summary judgment, DOJ will of course establish the reasonableness of its search via agency declaration(s).

Third, Plaintiff's challenge to the adequacy of the searches being conducted by DOJ (including search terms) is not only premature, but also based on a false premise. "In general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request." *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) (citing *Physicians for Human Rights v. Dep't of Def.*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009)). Rather, a federal agency has discretion in crafting a list of search terms that it believes to be reasonably tailored to uncover documents responsive to the FOIA request. See *Bigwood*, 132 F. Supp.3d at 140 (citing *Physicians for Human Rights*, 675 F. Supp. 2d at 164). Similarly, the reasonableness of a search "is not

measured against the scope dictated by a requester’s search instructions.” *McClanahan v. U.S. Dep’t of Justice*, 204 F. Supp. 3d 30, 44 (D.D.C. 2016), *aff’d*, 712 Fed. Appx. 6 (D.C. Cir. 2018); *see also Mobley v. CIA*, 806 F.3d 568, 582 (D.C. Cir. 2015) (rejecting plaintiff’s approach, “which would allow a requester to dictate, through search instructions, the scope of an agency’s search,” as undermining “the reasonableness test for search adequacy long adhered to in this circuit”).

For all of these reasons, the Court should allow the parties to continue discussing any issues regarding DOJ’s processing of the FOIA requests, including any issues raised by Plaintiff in this status report, and to file a joint status report in thirty days. However, the Court should deny Plaintiff’s request for an immediate hearing regarding the adequacy of DOJ’s searches.

DATED: February 21, 2019

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION,

Defendant.

Civil Action No. 18-2422 (APM)

JOINT STATUS REPORT

The parties, by and through their undersigned counsel, respectfully submit this status report pursuant to the Court's minute order of January 30, 2019.

Introduction

1. At issue are two Freedom of Information Act (FOIA) requests submitted by Plaintiff to Defendant, the Federal Bureau of Investigation (FBI), on August 30, 2018, seeking records relating to the FBI Headquarters Consolidation Project. Plaintiff filed the Complaint on October 23, 2018, ECF No. 1; Defendant filed its Answer on December 7, 2018, ECF No. 7.

2. As previously reported, the parties are discussing the requests and Defendant's plan to search for potentially responsive records. On February 1, 2019, Defendant sent an email to Plaintiff regarding Defendant's plan for processing the two FOIA requests, including search terms to be used. On February 4, 2019, Plaintiff provided Defendant with comments as to Defendant's search terms. On February 13, 2019, Defendant responded to Plaintiff's comments regarding the agency's proposed search.

3. The parties submit separate statements below regarding their respective positions and proposals for moving forward.

Plaintiff's Statement

4. At issue in this matter are two FOIA requests that made clear and specific requests for records related to the federal government's consideration of the relocation of the FBI Headquarters, the "Hotel Communications FOIA" request and the "White House Communications FOIA" request.

5. The parties have reached an impasse regarding the adequacy of Defendant's proposed search for records responsive to Plaintiff's requests. Defendant is refusing to run searches reasonably calculated to identify the records sought by these two requests. Instead, as explained more fully below, Defendant proposes to run a more limited search excluding custodians whose records are expressly sought by the request and using effectively only two proximity searches likely to exclude many responsive records. With respect to the Hotel Communications FOIA request, Defendant's proposed search ignores the plain terms of the request and consequently will not identify the document sought. Likewise, with respect to the White House Communications FOIA request, Defendant's proposed search is inadequate because it ignores Plaintiff's sixteen requested search terms and the proposals are patently incomplete and rely on searching for complex phrases that appear designed to miss relevant records. Furthermore, Defendant has not articulated a reasonable explanation as to why it will not conduct the searches necessary to identify and produce all responsive records.

6. The FOIA requires agencies to "make records promptly available to any person" "upon any request for records which . . . reasonably describes such records." 5 U.S.C. § 552(a)(3)(A). The Department of Justice's own FOIA guide states, "The key to determining whether a request satisfies the ['reasonably describes'] requirement is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them." *United*

States Department of Justice Guide to the Freedom of Information Act, “Procedural Requirements” 22 (Sept. 4, 2013),

<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf>
(citations omitted).

7. In the “Hotel Communications FOIA,” American Oversight requested two categories of records from the agency from January 20, 2017, through the date of the search. First, Plaintiff requested records reflecting communications from certain specifically identified employees at the FBI (“the FBI custodians”)¹ and “any individuals associated with the Trump Organization LLC or Trump Hotels, including but not limited to” fifteen named persons and one category of “anyone communicating from an email address ending with” one of four domain names. Compl. ¶ 15. Second, American Oversight requested all records reflecting communications with the identified FBI custodians “containing [at least one of six] search terms.” *Id.*

8. The terms of the Hotel Communications FOIA request seek a clearly identified set of agency records that can be readily located by the FBI with a reasonable amount of effort. The first category of this request seeks records reflecting communications between specifically identified FBI personnel and specifically identified persons acting in non-governmental capacities for an identified timeframe. Similarly, the second category of this request seeks records reflecting all communications containing one (or more) of six identified terms for a small number of identified FBI custodians over an identified time period.

¹ Eight persons are identified by name, with one person named twice to ensure a search for records in two positions he held during the responsive time period; one requested custodian is described by title; and one category of custodians included “anyone communicating on behalf of four of the requested positions.”

9. Based on the clear terms of each category of the Hotel Communications FOIA request, an FBI employee could reasonably ascertain which agency records are sought and locate them. Both components of the request seek communications for a small set of specific FBI employees over an identified timeframe, and further limits the records sought, the first by seeking only communications with a small set of specific, identified non-governmental persons; and the second by seeking only communications containing one (or more) of six specific, identified terms.

10. Notwithstanding the fact that there can be no doubt that the Hotel Communications FOIA reasonably describes the records sought, including as that requirement is defined in DOJ's own FOIA guide, the FBI has refused to undertake a search to identify the requested records, and seeks to substitute instead a search of a more limited number of custodians filtered by a quite limited set of search terms. Defendant has provided no legitimate explanation for its refusal to search for the records actually sought by this request.

11. In the "White House Communications FOIA," American Oversight requested records reflecting communications between or among any person at the White House Office and the identified FBI custodians "regarding the FBI headquarters consolidation project." Compl. ¶ 10. American Oversight further requested that the agency use sixteen specified terms to help identify responsive records. *Id.* ¶ 11.

12. The White House Communications FOIA request likewise reasonably describes the records sought allowing any agency employee to ascertain and locate all responsive records. First, the request is limited to records reflecting communications between a limited number of specifically identified FBI custodians and the White House Office from January 20, 2017, through the date of the search. Within that set, Plaintiff requested that the agency search for

records that contain one (or more) of sixteen search terms. While this request employs a longer list of search terms, it seeks a search only of that subset of communications that include both the identified FBI custodians and the White House Office.

13. Notwithstanding the clear language of the request, Defendant is again declining to undertake a search reasonably calculated to identify records responsive to the White House Communications FOIA request. Although American Oversight specifically requested that the identified search terms be used, the agency is refusing to do so based purely on speculation, blindly claiming that—despite the request’s clear limitations on (a) the custodians to be searched; (b) the correspondents whose communications are responsive; (c) the use of one of sixteen identified search terms; and (d) the time period to be searched—it believes the potential yield of potentially responsive records to be reviewed might be too burdensome.

14. The sixteen search terms identified relate to the president’s interest in the Old Post Office building and the FBI headquarters procurement process being run by the General Services Administration. In a properly-run federal procurement process, there would be limited reason for the FBI custodians to be communicating with the White House Office regarding those subjects, and it would be reasonable to expect few if any responsive records. Thus the agency’s refusal to run the search as requested raises more concerns than it seeks to address: surely it cannot be that Defendant is suggesting that FBI Director Christopher Wray and other senior FBI officials were communicating with the White House Office and referencing the “Trump International Hotel” (one of the requested search terms) with such frequency that the resulting volume of records would be overly burdensome for the agency to review.

15. “[T]he adequacy of a FOIA search is generally determined . . . by the appropriateness of the methods used to carry out the search.” *Weisberg v. U.S. Dep’t of Justice*,

705 F.2d 1344, 1351 (D.C. Cir. 1983). American Oversight requested specific searches and Defendant is refusing honor the requested method of search. The agency's proposed search terms are inadequate and appropriate. First, with respect to the Hotel Communications FOIA request, as explained above, the proposed search simply fails to account for the records actually sought by the request. With respect to the White House Communications FOIA request, Defendant's proposed search terms are not reasonably calculated to identify the requested records, but instead are overly limited, defy common sense, and fail to account for how officials would be likely to communicate in responsive communications. For example, one of the aspects on which the request clearly seeks records is communications discussing whether the presence of the president's hotel across from the FBI Headquarters at all influenced the decision not to relocate the agency. *See* Compl. ¶ 11 (listing search terms to include "Trump International Hotel," "TIH," "Post Office," and "OPO," among others). None of the FBI's proposed search terms include any reference to the Trump International Hotel or the federally owned Old Post Office Building that the hotel occupies. As another deficiency in the agency's proposed search, the required combinations of terms do not reflect how persons would naturally discuss this project. While it is possible that someone reporting out on a meeting at the White House might say, "The White House had no position on consolidation," it is also possible that someone reporting out on the same meeting might say, "Kelly said they had no position on consolidation." American Oversight's requested search would capture the latter communication, but the FBI's proposed search does not.

16. Plaintiff's interest is in getting copies of non-exempt material promptly as required by FOIA and not in delay and protracted processing by the agency, and so Plaintiff remains open to undertaking an informed discussion regarding narrowing if necessary after

Defendant has undertaken an initial search. As Plaintiff has demonstrated repeatedly in other matters involved in FOIA litigation and in FOIA processing discussions with agencies, if the requested searches yield an overly burdensome number of records for Defendant to review, Plaintiff would be happy to engage in a negotiation to narrow the records to be reviewed within that set. However, any narrowing discussions can only be undertaken in an informed manner with actual information regarding the results of initial searches—for instance, if one search term is resulting in numerous, inapposite hits, Plaintiff would of course be willing to engage in discussions with Defendant. At this point, however, Plaintiff believes that the request is not overly burdensome as drafted and maintains that Defendant should search for the records as requested. Any suggestion otherwise is simply uninformed speculation at this point.

1. In light of this impasse and because it would not serve the interests of Plaintiff, Defendant, or the Court for Defendant to proceed with its proposed search before these clear insufficiencies are addressed, Plaintiff requests that the Court order them to appear for a status conference on February 28, 2019, or on another date convenient for the Court. Plaintiff has not had an opportunity to review Defendant's Statement, and reserves the right to file a supplementary response.

Defendant's Statement

The FBI's Search Plan for Plaintiff's FOIA Requests

The first FOIA request at issue in this case (FOIA 1415577) seeks certain records between specified FBI officials and persons at the White House regarding the FBI headquarters consolidation project.

The second FOIA request (FOIA 1415579) includes two parts. The first part, which seeks certain records between specified DOJ officials and specified Trump Organization officials, does not expressly state a subject matter. The second part of this request, which seeks records to or from specified DOJ officials, does not identify any third parties and, although Plaintiff suggests various search terms as discussed below, the request does not expressly state a subject matter. The FBI interprets this request as seeking records pertaining to (a) communications between specified FBI individuals and specified individuals associated with the Trump Organization or the Trump Hotel regarding the FBI headquarters consolidation project, or (b) communications with specified FBI officials regarding the Trump Hotel.

The FBI has notified Plaintiff of the following search plan for the two FOIA requests at issue in this case. The FBI's expertise with its own records systems and the methods by which to search them has informed its search plan. To obtain any records responsive to the FOIA requests, the FBI is conducting a Sentinel Search for administrative files using the following list of search terms:

Headquarters Relocation,
FBI HQ Relocation,
Headquarters consolidation, OR
FBI HQ Consolidation.

The FBI will also conduct email searches of Director Wray, Former Director Comey, DD Bowdich, former DD McCabe, AD Richard Haley of Finance Division, and the UC for the HQ Program Management Office. The FBI will use the following search list of terms for these searches:

White House AND Consolidation,
White House AND Relocation,
@whp.eop.gov AND Consolidation,
@whp.eop.gov AND Relocation,
Trump AND Consolidation, OR
Trump AND Relocation.

If these email searches identify other custodians of records, the FBI will then follow up.

The FBI determined that these search terms for the FOIA requests are reasonably calculated to locate all documents potentially responsive to the requests, without capturing an inordinate number of records that are unrelated to the subject matter of the requests. Many of the search terms suggested by Plaintiff (including “Post Office” and “consolidate*”) are so vague and general that use of such proposed terms on their own would likely result in locating many records unrelated to the subject matter of the FOIA requests. As a result, use of Plaintiff’s proposed terms would cause significant delays in conducting searches, reviewing records for responsiveness, and making determinations as to the application of any applicable FOIA Exemptions.

The FBI has informed Plaintiff that the FBI initiated a search for any potentially responsive records.

Defendant’s Position as to Plaintiff’s Request for an Immediate Hearing

The FBI will continue to consult with Plaintiff as to any issues regarding the FBI’s processing of the FOIA requests, including issues raised by Plaintiff in this status report. However, the Court should deny Plaintiff’s request for an immediate hearing regarding the adequacy of the search that is being conducted by FBI for any records responsive to Plaintiff’s FOIA requests. First, to the extent that Plaintiff now seeks affirmative relief, Plaintiff should be required to follow normal motion practice, rather than seeking relief in the guise of a joint status

report. Second, even if Plaintiff were to file such a motion, it would be premature for the parties to litigate the adequacy of the search before the FBI completes the search and processes any responsive records, and Plaintiff’s request for an immediate hearing on this issue contravenes this district’s established procedures for FOIA cases. “FOIA cases are typically and appropriately decided on motions for summary judgment.” *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). Summary judgment in a FOIA case is most appropriate after the agency has finished producing all responsive, non-exempt information to the FOIA petitioner.

After providing Plaintiff with the FBI’s search plan (including search terms), the FBI initiated its search for any responsive records. The FBI’s expertise with its own records systems and the methods by which to search them has informed its search plans. The FBI should be permitted to conduct the search and complete its processing of any responsive records prior to any litigation as to the adequacy of the search.

Third, Plaintiff’s challenge to the adequacy of the search being conducted by the FBI (including search terms) is not only premature, but also based on a false premise. “In general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request.” *Bigwood v. U.S. Dep’t of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) (citing *Physicians for Human Rights v. Dep’t of Def.*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009)). Rather, a federal agency has discretion in crafting a list of search terms that it believes to be reasonably tailored to uncover documents responsive to the FOIA request. *See Bigwood*, 132 F. Supp. 3d at 140 (citing *Physicians for Human Rights*, 675 F. Supp. 2d at 164). Similarly, the reasonableness of a search “is not measured against the scope dictated by a requester’s search instructions.” *McClanahan v. U.S. Dep’t of Justice*, 204 F. Supp. 3d 30, 44 (D.D.C. 2016), *aff’d*, 712 Fed. Appx. 6 (D.C. Cir. 2018); *see also Mobley v. CIA*, 806 F.3d 568, 582 (D.C. Cir. 2015) (rejecting plaintiff’s approach,

“which would allow a requester to dictate, through search instructions, the scope of an agency’s search,” as undermining “the reasonableness test for search adequacy long adhered to in this circuit”).

For all of these reasons, the Court should allow the parties to continue discussing any issues regarding the FBI’s processing of the FOIA requests, including any issues raised by Plaintiff in this status report, and to file a joint status report in thirty days. However, the Court should deny Plaintiff’s request for an immediate hearing regarding the adequacy of the FBI’s search.

DATED: February 21, 2019

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